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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
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12 GREGORY L. FLETCHER,  
13  
14 Plaintiff,  
15 v.  
16 CORRECTIONAL OFFICER  
17 MARQUEZ, et al.,  
18 Defendants.

Case No.: 16cv564-JLS-MDD

**REPORT AND  
RECOMMENDATION ON  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

[ECF No. 15]

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20 This Report and Recommendation is submitted to United States  
21 District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b) and  
22 Civil Local Rules 72.1(c) of the United States District Court for the  
23 Southern District of California. For the following reasons, the Court  
24 **RECOMMENDS** that Defendants' Motion for Summary Judgment be  
25 **GRANTED.**

1 **I. PROCEDURAL HISTORY**

2 Gregory L. Fletcher (“Plaintiff”) is a state prisoner proceeding *pro*  
3 *se* and *in forma pauperis*, with a civil complaint filed pursuant to 42  
4 U.S.C. § 1983. (ECF Nos. 1, 3). In his Complaint, Plaintiff sets forth  
5 three claims alleging that his First Amendment rights of access to  
6 courts were violated when prison personnel retaliated against him for  
7 making a complaint against a correctional officer; by using racial slurs,  
8 threatening him with a “mini 14 gun,” and falsifying documents  
9 accusing him of extortion and blackmail of the medically disabled  
10 inmates he worked with; and by intentionally misplacing or destroying  
11 the tape recording of his interview about the retaliation with the  
12 Captain. (ECF No. 1). Plaintiff served Correctional Officer Edrozo  
13 (mistakenly sued as “Odroszo”), Sergeant Whiting, and Lieutenant  
14 Davis, but the summons was returned unexecuted as to Correctional  
15 Officer Marquez. (ECF No. 7).

16 On March 17, 2017, Defendants Edrozo, Whiting, and Davis filed  
17 a motion for summary judgment, and served a *Rand* notice on Plaintiff.  
18 (ECF No. 15). In their motion, Defendants move for summary judgment  
19 regarding all claims asserted in the complaint. (*Id.*). In response, on  
20 April 05, 2017, Plaintiff filed his opposition to Defendants’ motion for  
21 summary judgment. (ECF No. 19).

22 **II. LEGAL STANDARD**

23 Rule 56(c) of the Federal Rules of Civil Procedure authorizes the  
24 granting of summary judgment “if the pleadings, depositions, answers  
25 to interrogatories, and admissions on file, together with the affidavits, if

1 any, show that there is no genuine issue as to any material fact and  
2 that the moving party is entitled to judgment as a matter of law.” The  
3 standard for granting a motion for summary judgment is essentially the  
4 same as for the granting of a directed verdict. Judgment must be  
5 entered, “if, under the governing law, there can be but one reasonable  
6 conclusion as to the verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
7 242, 250-51 (1986). “If reasonable minds could differ,” however,  
8 judgment should not be entered in favor of the moving party. *Id.*

9       The parties bear the same substantive burden of proof as would  
10 apply at a trial on the merits, including plaintiff’s burden to establish  
11 any element essential to his case. *Liberty Lobby*, 477 U.S. at 252;  
12 *Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *Taylor v. List*, 880 F.2d  
13 1040, 1045 (9th Cir. 1989). The moving party bears the initial burden  
14 of identifying the elements of the claim in the pleadings, or other  
15 evidence, which the moving party “believes demonstrates the absence of  
16 a genuine issue of material fact.” *Celotex*, 477 U.S. at 323; *Adickes v.*  
17 *S.H. Kress & Co.*, 398 U.S. 144 (1970); *Zoslaw v. MCA Distrib. Corp.*,  
18 693 F.2d 870, 883 (9th Cir. 1982). “A material issue of fact is one that  
19 affects the outcome of the litigation and requires a trial to resolve the  
20 parties’ differing versions of the truth.” *S.E.C. v. Seaboard Corp.*, 677  
21 F.2d 1301, 1305-1306 (9th Cir. 1982). More than a “metaphysical  
22 doubt” is required to establish a genuine issue of material fact.  
23 *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574,  
24 586 (1986).

1       The burden then shifts to the non-moving party to establish,  
2 beyond the pleadings, there is a genuine issue for trial. *Celotex*, 477  
3 U.S. at 324. To successfully rebut a properly supported motion for  
4 summary judgment, the non-moving party “must point to some facts in  
5 the record that demonstrate a genuine issue of material fact and, with  
6 all reasonable inferences made in the plaintiff[s] favor, could convince a  
7 reasonable jury to find for the plaintiff[.]” *Reese v. Jefferson School*  
8 *Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000) (citing FED. R. CIV. P.  
9 56; *Celotex*, 477 U.S. at 323; *Liberty Lobby*, 477 U.S. at 249).

10       In ruling on a motion for summary judgment, the court need not  
11 accept legal conclusions “cast in the form of factual allegations.”  
12 *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). “No  
13 valid interest is served by withholding summary judgment on a  
14 complaint that wraps nonactionable conduct in a jacket woven of legal  
15 conclusions and hyperbole.” *Vigliotto v. Terry*, 873 F.2d 1201, 1203 (9th  
16 Cir. 1989).

17       Moreover, “[a] conclusory, self-serving affidavit, lacking detailed  
18 facts and any supporting evidence, is insufficient to create a genuine  
19 issue of material fact.” *F.T.C. v. Publ’g Clearing House, Inc.*, 104 F.3d  
20 1168, 1171 (9th Cir. 1997). But, “the district court may not disregard a  
21 piece of evidence at the summary stage solely based on its self-serving  
22 nature.” *Nigro, supra*, 784 F.3d at 497-498 (finding plaintiff’s  
23 “uncorroborated and self-serving” declaration sufficient to establish a  
24 genuine issue of material fact because the “testimony was based on  
25 personal knowledge, legally relevant, and internally consistent.”).

### III. PARTIES' ALLEGATIONS AND CONTENTIONS

#### A. Plaintiff's Allegations

Plaintiff's Complaint alleges three interwoven claims of denial of access to the courts arising from incidents of alleged retaliation by Defendants in early 2014. (ECF No. 1). Plaintiff's first claim alleges that Officer Marquez retaliated against him and violated his First Amendment right of access to courts by "pulling his mini 14 gun out" and pointing it to his head, stating that he can "get [him] at any time." (*Id.* at 3). During this incident, Officer Marquez used racial slurs, referring to plaintiff as a "monkey." (*Id.*).<sup>1</sup>

The second claim alleges Defendant Edrozo violated Plaintiff's First Amendment right of access to courts when he conspired with a "snitch name[d] Doc," who gave Defendant Edrozo deceitful information that was used in retaliation against Plaintiff. (*Id.* at 4). Defendant Edrozo retaliated against Plaintiff when he wrote a "letter stating, that, [Plaintiff] was blackmailing and extorting inmates," which prevented him from writing to the courts. (*Id.*).

The third claim alleges Defendants Whiting and Davis violated Plaintiff's First Amendment right of access to courts by intentionally destroying and/or hiding a tape recorded interview about the threatening incident with Officer Marquez, summarized above. (*Id.* at 5). Plaintiff alleges that these Defendants were attempting to "cover it

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<sup>1</sup> This claim is being summarized despite the fact that Officer Marquez has never been served because it relates to Plaintiff's third claim against Defendants.

1 all up” when the “[r]ecord[ed] [t]ape, [ ] came up missing” while stating  
2 that “somebody broke into their security locker where no inmate can go”  
3 and stole it. (*Id.*).

4 Plaintiff attached several CDRC Form 22s to his Complaint.  
5 Those mainly pertain to an event in which Defendant Whiting and  
6 another employee took Plaintiff’s property from his cell without  
7 returning them or leaving a receipt. (*Id.*).

### 8 **B. Defendants’ Contentions**

9 According to their motion, Defendants are entitled to summary  
10 judgment because “[Plaintiff] did not exhaust all administrative  
11 remedies.” (ECF No. 15-1 at 70<sup>2</sup>). Defendants stress Plaintiff withdrew  
12 his appeal at the First Level, thus abandoning his claims without  
13 exhausting the three required levels of review. (*Id.* at 71).

14 In the alternative, Defendants also contend that the retaliation  
15 claim against Defendant Edrozo is *Heck* barred since Plaintiff  
16 challenges the validity of his conviction for extorting coffee which  
17 resulted in the loss of good-time credits. (ECF No. 15-1 at 73).  
18 Defendants further contend that even if the claim against Defendant  
19 Edrozo is not *Heck* barred, the “undisputed facts show . . . no  
20 retaliation” because Defendant Edrozo wrote the rules violation report  
21 in response to a prior related investigation and several inmate  
22 informants in an effort to advance penological goals. (*Id.*).

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23  
24 <sup>2</sup>All references to page numbers in this Report and Recommendation  
25 refer to the CM/ECF electronically-assigned pagination unless  
otherwise noted.

1 Finally, Defendants Davis and Whiting contend that they are  
2 entitled to summary judgment because the retaliation claim against  
3 them is based entirely on “illogical speculation,” for which there is no  
4 supporting evidence showing that they hid or destroyed the tape. (*Id.* at  
5 75). Defendants Davis and Whiting additionally contend that even if it  
6 was found that they hid or destroyed the tape, Plaintiff was not harmed  
7 by any adverse action since the interview was also logged in writing.  
8 (*Id.* at 77).

### 9 **C. Plaintiff's Contentions**

10 In opposition to Defendants' motion, Plaintiff asserts that “there is  
11 [no] illogical speculation” and it “is as a fact and true” by all evidence  
12 and proof that Defendants retaliated against him. (ECF No. 19 at 171).  
13 Plaintiff contends that Defendants Whiting and Davis intentionally  
14 destroyed the tape recorded evidence. (*Id.* at 175, 177). Plaintiff  
15 further contends that Defendant Edrozo “lied, made false statements  
16 and perjur[ed] himself” because his witnesses stated that he did nothing  
17 wrong and willingly gave him coffee. (*Id.* at 176-177). Additionally,  
18 Plaintiff contends that the rules violation report on January 14, 2014,  
19 where Officer R. Bedolla found two 16oz jars of Folgers coffee without a  
20 receipt, could not have been a violation since items were freely passed  
21 between officers and inmates. (*Id.* at 176).

22 Plaintiff provides three exhibits (A, B and C) in support of his  
23 opposition. (*Id.* at 179). Plaintiff does not mention nor produce any  
24 evidence that he exhausted the prison's grievance process. (*Id.* at 176).  
25 Exhibit A, labeled “My Witness,” includes the rules violation report

1 from the hearing on his coffee extortion charge. (*Id.* at 180-182). This  
2 attachment includes the testimony from all three witnesses questioned  
3 in this hearing. (*Id.*). Exhibit B consists of a “Confidential Information  
4 Disclosure Form,” which states that Defendant Edrozo used confidential  
5 information in his report. (*Id.* at 184). Exhibit C includes a report from  
6 Officer R. Bedolla, detailing the coffee finding and violation for  
7 “Possession and Exchange.” (*Id.* at 186-191). Exhibit C further  
8 includes several property receipts and a list of what items Plaintiff  
9 claims were damaged or destroyed in a separate incident. (*Id.*).

#### 10 **IV. DISCUSSION**

##### 11 **A. Exhaustion of Administrative Remedies**

12 Defendants seek summary judgment on the ground that Plaintiff  
13 failed to exhaust his administrative remedies with respect to all claims  
14 alleged in the Complaint. (ECF No.15-1 at 70-71). In his opposition,  
15 Plaintiff does not address whether he exhausted the available  
16 administrative remedies. (ECF No. 19).

##### 17 **1. Standard**

18 Under the Prison Litigation Reform Act (PLRA), “[n]o action shall  
19 be brought with respect to prison conditions under . . . [42 U.S.C. §  
20 1983], or any other Federal law, by a prisoner confined in any jail,  
21 prison, or other correctional facility until such administrative remedies  
22 as are available are exhausted.” 42 U.S.C. § 1997e(a) (West 2014); *see*  
23 *also Booth v. Churner*, 532 U.S. 731, 736 (2001); *Morton v. Hall*, 599  
24 F.3d 942, 945 (9th Cir. 2010). “[A] prisoner must complete the  
25 administrative review process in accordance with the applicable



1 procedural rules . . . as a precondition to bringing suit in federal court.”  
2 *Woodford v. Ngo*, 548 U.S. 81, 88 (2006).

3 Prisoners must exhaust prison administrative procedures  
4 regardless of whether the type of relief they seek matches the type of  
5 relief available through administrative procedures. *See Booth*, 532 U.S.  
6 at 741; *see also Morton*, 599 F.3d at 945. But the PLRA requires  
7 exhaustion only of those administrative remedies “as are available,” and  
8 the PLRA does not require exhaustion when circumstances render  
9 administrative remedies “effectively unavailable.” *Nunez v. Duncan*,  
10 591 F.3d 1217, 1223-1226 (9th Cir. 2010) (plaintiff’s failure to exhaust  
11 was excused because he took reasonable steps and was precluded from  
12 exhausting by the warden’s mistake).

13 Failure to exhaust administrative remedies is an affirmative  
14 defense that defendants must raise and prove. *See Jones v. Bock*, 549  
15 U.S. 199, 212-217 (2007) (explaining that inmates are not required to  
16 specifically plead or demonstrate exhaustion in their complaints).  
17 Specifically, “the defendant's burden is to prove that there was an  
18 available administrative remedy, and that the prisoner did not exhaust  
19 that available remedy.” *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir.  
20 2014) *cert. denied sub nom. Scott v. Albino*, 135 S. Ct. 403 (2014). After  
21 the defendant has met that burden, the prisoner has the burden of  
22 production. *Id.* “That is, the burden shifts to the prisoner to come  
23 forward with evidence showing that there is something in his particular  
24 case that made the existing and generally available administrative  
25 remedies effectively unavailable to him.” *Id.* The plaintiff may rebut

1 “by showing that the local remedies were ineffective, unobtainable,  
2 unduly prolonged, inadequate, or obviously futile.” *Id.* (quoting *Hilao v.*  
3 *Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996)).

4 “The obligation to exhaust ‘available’ remedies persists as long as  
5 some remedy remains ‘available.’” *Brown v. Valoff*, 422 F.3d 926, 935  
6 (9th Cir. 2005) (emphasis added); *Booth*, 532 U.S. at 738. A withdrawn  
7 appeal “is to abandon one’s claim, to fail to exhaust one’s remedies.”  
8 *Rivera v. United States Postal Service*, 830 F.2d 1037, 1039 (9th Cir.  
9 1987) (applying the general rule in employment civil rights context);  
10 *and see, e.g., Cruz v. Tilton*, Case No. 1:06cv883-DLB-PC, 2009 WL  
11 3126518, \*14 (E.D. Cal. Sep. 23, 2009) (applying this holding from  
12 *Rivera* in a prisoner §1983 context and finding plaintiff failed to  
13 exhaust claims because he withdrew the grievances); *Rio v. Morgado*,  
14 Case No. 10cv8955-CJC-PR, 2012 WL 209401, \*4-\*5 (C.D. Cal. May 1,  
15 2012) (no exhaustion where prisoner plaintiff voluntarily withdrew  
16 grievance concerning the use of fans to cause pain once he was seen by a  
17 doctor).

18 Where a plaintiff has not obtained all of the available remedies,  
19 “[a] withdrawn inmate grievance cannot be used to demonstrate  
20 exhaustion of administrative remedies.” *Cruz*, 2009 WL 3126518, at \*5;  
21 *Rio*, 2012 WL 209401; *but cf. Harvey v. Jordan*, 605 F.3d 681 (9th Cir.  
22 2010) (exhaustion found despite early termination where prisoner  
23 plaintiff’s request to access a videotape—the *only* remedy available  
24 through the grievance system—was granted); *Hallford v. Cal. Dep’t of*  
25 *Corr.*, 343 Fed. Appx. 176 (9th Cir. 2009) (exhaustion found despite

1 early termination where prisoner plaintiff's request for a vegetarian  
2 meal card—the *only* remedy available to him through the grievance  
3 system—was granted).

## 4 **2. Analysis**

### 5 **i. Administrative remedies exist**

6 Defendants have met their burden of showing that a grievance  
7 procedure existed. (ECF No. 15-1 at 70-71); Cal. Code Regs. Tit. 15 §§  
8 3084.1(a), 3084.1(b), 3084.2(a), 3084.7(b) and 3084.7(d)(3).

9 Under Title 15, inmates may challenge any condition or action  
10 that adversely affects their welfare. (*Id.*). To challenge these conditions  
11 and seek relief, an inmate must submit a CDC Form 602 inmate appeal  
12 at the First Level of review. (*Id.*). If an inmate is dissatisfied with the  
13 First Level of review then he must appeal to the Second Level of review.  
14 (*Id.*). If the inmate is still dissatisfied after the Second Level of review,  
15 then he must appeal to the Third Level. (*Id.*). Unless there is a  
16 regulatory exception, all claims must be brought to the Third Level to  
17 be considered exhausted. (*Id.*).

18 Plaintiff had knowledge that this grievance process was available  
19 to him. Plaintiff has filed both Form 22s and a 602 for their respective  
20 purposes, showing his understanding of the system.

### 21 **ii. Exhaustion**

22 Defendants met their burden of showing that Plaintiff did not  
23 exhaust the available administrative grievance process. (ECF No. 15-1  
24 at 70-71). Specifically, Defendants provide Plaintiff's 602 inmate  
25

1 appeal, Log No. RJD-D-14-01234, directed towards Defendant Edrozo  
2 for retaliation. (ECF No. 15-5 at 138-141).

3 On March 25, 2016, Plaintiff filed his 602 claiming retaliation.  
4 (*Id.* at 138). On May 02, 2014, his 602 was accepted at the First Level  
5 of review. (*Id.*). On June 05, 2016, Plaintiff withdrew his 602 at the  
6 First Level. (*Id.*). He noted that he received some but not all of the  
7 requested property. (*Id.*). Plaintiff's 602 was not "granted" nor  
8 "partially granted." Plaintiff did not receive *all* of the requested relief  
9 available to him through this grievance process.

10 Plaintiff was required to appeal through all available  
11 administrative remedies before filing his Complaint. *Booth*, 532 U.S.  
12 731; *Brown*, 422 F.3d 926; *Cruz*, 2009 WL 3126518; *Rio*, 2012 WL  
13 209401. By withdrawing his 602 inmate appeal at the First Level after  
14 receiving only some of the requested relief available, Plaintiff failed to  
15 exhaust his claims. *Id.*

### 16 **iii. Production**

17 Plaintiff failed to meet his burden of production. In his opposition,  
18 Plaintiff did not identify any evidence to show that the grievance  
19 procedure was effectively unavailable to him or that he had exhausted  
20 the procedure.

21 In sum, the Court **RECOMMENDS** finding that all claims were  
22 not exhausted through the administrative process, and that summary  
23 judgment be **GRANTED** in favor of Defendants Edrozo, Whiting and  
24 Davis.

1 **V. CONCLUSION**

2 For the reasons set forth herein, the Court **RECOMMENDS** that  
3 Defendants' Motion for Summary Judgment be **GRANTED**.

4 This Report and Recommendation will be submitted to the United  
5 States District Judge assigned to this case, pursuant to the provisions of  
6 28 U.S.C. § 636(b)(1). Any party may file written objections with the  
7 court and serve a copy on all parties by **August 21, 2017**. The  
8 document shall be captioned "Objections to Report and  
9 Recommendation." Any reply to the objections shall be served and filed  
10 by **August 28, 2017**.

11 The parties are advised that failure to file objections within the  
12 specified time may waive the right to raise those objections on appeal of  
13 the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14  
15 **IT IS SO ORDERED.**

16  
17 Dated: August 3, 2017



Hon. Mitchell D. Dembin  
United States Magistrate Judge